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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Joseph C. Spero, Magistrate Judge

CREDIT SUISSE VIRTUOSO,)	
)	
Petitioner,)	
)	
VS.)	NO. C 21-MC-80308
)	
SB INVESTMENT ADVISERS (US))	
INC.,)	
)	
Respondent.)	
_____)	

San Francisco, California
Friday, May 20, 2022

TRANSCRIPT OF REMOTE TELECONFERENCE PROCEEDINGS

APPEARANCES: (Appearances via Zoom teleconference.)

For Petitioner:

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BY: ROBERT P. FELDMAN, ATTORNEY AT LAW

Also Present: Aidan O'Connor

Friday - May 20, 2022

2:01 p.m.

P R O C E E D I N G S

---oOo---

THE CLERK: Calling Case Number 3-21-MC-80308, In Re:
Credit Suisse Virtuoso.

Counsel, could you please state your hands. Please raise
your hands. I'm sorry.

Thank you.

Counsel, just to let you know, when I promote you, if you
get a message that says "join as panelist" please join as
panelist.

(Pause in proceedings.)

THE CLERK: I believe I have everybody, Judge.

THE COURT: All right.

MR. MATUSCHAK: I think we may be waiting for my
colleague Ms. Roy. I didn't see her there.

THE CLERK: Wait a minute. I have another hand.
Sorry. Didn't see her hand. I apologize.

(Pause in proceedings.)

THE COURT: Okay. Are we expecting anyone else?

MR. CORKHILL: Not from the SoftBank investor side,
Judge.

MS. ROY: We're all present for Credit Suisse.

THE COURT: Okay. Appearances, please.

MR. FELDMAN: Can anyone hear me? This is -- this

1 is -- excuse me. Can you hear me? This is Robert Feldman.

2 THE COURT: You can't hear us?

3 MR. FELDMAN: I seem to have lost the video.

4 THE COURT: You can't hear us. We can hear you.

5 MR. FELDMAN: I can hear you. Can you hear me, Your
6 Honor?

7 THE COURT: We can see you too. You're the
8 white-haired guy in the corner.

9 MR. FELDMAN: I can hear you, yes; but I'm not
10 seeing -- I'm not seeing you.

11 THE COURT: You're not missing much.

12 MR. FELDMAN: I had been seeing you. Let's see,
13 maybe. Let's see.

14 I'd been seeing you and hearing everybody talking about
15 their weekend plans, and now I seem to have lost the ability to
16 see.

17 THE COURT: Is there a --

18 MR. FELDMAN: For which I apologize, of course.

19 THE COURT: A caret by the little video camera, do you
20 have a caret by the video camera? Make sure --

21 MR. FELDMAN: I don't want -- I don't see. I mean,
22 that's not the problem. I lost the screen.

23 May I ask for the Court's indulgence to attempt to sign in
24 again from scratch?

25 THE COURT: Yeah, go ahead.

1 **MR. FELDMAN:** It will take me two minutes. Okay? May
2 I?

3 **THE COURT:** Yes.

4 **MR. FELDMAN:** May I do that?

5 **THE COURT:** Yes. Yes.

6 **MR. FELDMAN:** Okay. I will do that. Thank you.

7 (Pause in proceedings.)

8 **MR. FELDMAN:** I can hear you.

9 **THE COURT:** You can hear us?

10 **MR. FELDMAN:** Yes, I can.

11 **THE COURT:** Should we march on?

12 **MR. FELDMAN:** I think so.

13 **THE COURT:** Okay.

14 **MR. FELDMAN:** Yes, Your Honor. Yes, Your Honor.

15 **THE COURT:** Then let's go with appearances, starting
16 with Credit Suisse.

17 **MR. BIDERMAN:** David Biderman, Your Honor, on behalf
18 of Credit Suisse.

19 **MS. ROY:** Your Honor, you have Tammy Roy of Cahill
20 Gordon; and I am joined also by Nick Matuschak and Vishwani
21 Singh of my firm, also for the petitioner.

22 **THE COURT:** And for SBIA?

23 **MR. FELDMAN:** Your Honor, you are -- you're not --
24 you're not going to want to hear this, Your Honor, but I'm
25 hearing double.

1 Yes, Your Honor. This is Robert Feldman.

2 Unfortunately --

3 THE COURT: You're getting an echo?

4 MR. FELDMAN: Yes. So -- go ahead.

5 THE COURT: So do you have a speaker on your computer
6 as opposed to using your earbuds?

7 MR. FELDMAN: I do.

8 THE COURT: You might want to try switching to that
9 and turn off the earbuds.

10 MR. FELDMAN: Okay.

11 (Pause in proceedings.)

12 THE COURT: And while you're doing that, I'll get the
13 other appearances.

14 MR. FELDMAN: Does that work better?

15 THE COURT: I can hear you. Can you hear us?

16 MR. FELDMAN: Yes, I think I can. It's slow.

17 THE COURT: It may be a foundational problem.

18 MR. FELDMAN: Your Honor, let me see if I can make
19 my --

20 THE COURT: Yeah, it's breaking up a little bit,
21 Mr. Feldman. Yeah.

22 MR. FELDMAN: Maybe I have to ask for the Court's
23 indulgence and do this right. I'll turn off my computer and
24 then log back in, Your Honor. I think that will work.

25 THE COURT: Okay. That's fine. The other alternative

1 is -- I don't know what your experience is with logging in from
2 a computer from this location, where you are, but if it's an
3 Internet issue -- the other alternative is to dial in on a
4 phone and just have audio, which is usually a narrower band,
5 and depending on the location, can be a better result. But if
6 you want to log out -- go out and come back in, that's fine
7 too.

8 **MR. FELDMAN:** I think -- I think we're okay. I've
9 Zoomed -- I've Zoomed with others. I Zoomed with others this
10 morning and I observed a colleague of yours Zoom this morning
11 to make sure this will all work.

12 **THE COURT:** Okay.

13 **MR. FELDMAN:** So I think it's probably something I'm
14 doing. Just please let --

15 **THE COURT:** Okay. We will take a brief recess while
16 Mr. Feldman --

17 **THE CLERK:** I see another Bob Feldman in my attendee
18 panel, so I don't know if he is maybe logged in twice -- oh, it
19 looks like he's disappeared now.

20 **THE COURT:** Okay. Well, so there is the problem.

21 **THE CLERK:** That might be -- Mr. Feldman, can you say
22 something?

23 **THE COURT:** No, he's not hearing us.

24 **MR. CORKHILL:** Your Honor, would you like me to give
25 you our appearances? I can give Bob's appearance as well.

1 It will, hopefully, subject to technical difficulties, be
2 Robert Feldman and myself, Andy Corkhill, of Quinn Emanuel for
3 SBIA (US).

4 **THE COURT:** All right. Thank you.

5 Always fun here on a Friday afternoon. Glad we could
6 provide some amusement.

7 (Pause in proceedings.)

8 **THE COURT:** Well, while he is trying to solve this
9 problem why don't we do another case. You can all stay here if
10 you want, just -- you can mute yourselves, but I could just --
11 why don't I take the other, the pro se matter that Ruth is
12 going to work on. We'll do that one and then hopefully
13 Bob's -- Mr. Feldman's thing will be worked out by then.

14 (Recess taken at 2:13 p.m.)

15 (Unrelated proceedings heard by the Court, reported but
16 not transcribed herein.)

17 (Proceedings resumed at 2:17 p.m.)

18 **THE CLERK:** Judge, I'm seeing another Bob Feldman in
19 the attendee panel.

20 **THE COURT:** Promote him and see what happens.

21 **THE CLERK:** Okay.

22 **THE COURT:** Mr. Feldman?

23 Mr. Corkhill, have you been in contact with him?

24 **MR. CORKHILL:** I'm just in contact with him now, Your
25 Honor. I'm just asking him to confirm.

1 **MR. FELDMAN:** Hello? Hello? Hello? Okay?

2 **THE COURT:** We can hear you. Can you hear us?

3 **MR. FELDMAN:** Perfectly, Your Honor. And I hope you
4 can hear my apology for whatever I've done wrong. Whatever
5 I've done wrong today.

6 **THE COURT:** We'll try not to get too far into that.

7 **MR. FELDMAN:** May I make our appearances, please?

8 **THE COURT:** They've already been done.

9 **MR. FELDMAN:** I see.

10 **THE COURT:** Including for you.

11 **MR. FELDMAN:** And did Your Honor's -- does the record
12 reflect the presence of Aidan O'Connor, who is the chief U.S.
13 regulatory counsel and chief compliance officer of SBIA (US)?

14 **THE COURT:** As in the -- he's in the attendees panel?

15 **MR. FELDMAN:** He would be in the attendees, yes.

16 **THE COURT:** Great. Okay. Welcome.

17 All right. So the Ninth Circuit, of course, as only they
18 can do, threw a small monkey wrench into these proceedings on
19 Wednesday, in the CBC patent technology case -- of course, it
20 would have to be a patent company that threw a monkey wrench
21 into this.

22 I think I have a way through it. Now, that you've all
23 consented, I still didn't have jurisdiction when I issued the
24 original order. But my thought about how to handle that, now
25 that there is consent, is I'll vacate that original order, and

1 I'll treat all the briefing and papers today as an application
2 to reissue that order and issue the same subpoena. It seems
3 it's all the same issue. It's all the same standards. And
4 this time we have consent.

5 How does that sound to -- let's start with -- Credit
6 Suisse?

7 **MS. ROY:** That's acceptable to Credit Suisse.

8 **THE COURT:** And, SBIA, is that okay?

9 **MR. FELDMAN:** We consent, fully.

10 **THE COURT:** Okay. All right. All right.

11 So then I actually have to decide this issue. And it's --
12 I want to skip to the part that matters to me, if you'll
13 indulge me a little bit.

14 The part that matters to me is the discretionary factors
15 because, frankly, I think I could -- if I was faithful to the
16 requirements in the circuit for the mandatory factors I would
17 get through them all.

18 The discretionary factor that holds me up is undue burden
19 or expense. And, you know, I just -- I know very little about
20 this. I'm not sure I know more, having read the factual
21 descriptions; it's so convoluted. But one thing that I think
22 I'm clear on is that in -- that CSV has got to -- is
23 contemplating a claim under Section 423, and in order to do
24 that, they have to seek and obtain leave of court for the
25 filing of that claim, and to serve on non-U.K. defendants.

1 Am I right on that so as far?

2 Are we all on the same page?

3 **MR. FELDMAN:** Yes, Your Honor.

4 **MS. ROY:** Yes, Your Honor.

5 **THE COURT:** Okay. And then there is disagreement
6 among the experts -- which are extraordinary experts.

7 I've got to say, these are amazing experts on both sides.
8 I've never seen so much money spent solely on the question of
9 whether documents get produced now or later. It's an amazing,
10 amazing set of experts. I compliment you on your experts;
11 maybe not on your use of resources, but on your experts.

12 The there is a dispute as to whether or not that leave
13 will be granted. Okay. I take that as a given. The issue for
14 me is this, and this is a question for Credit Suisse.

15 Have you sought leave yet? When are you going to seek
16 leave, and when are you going to know?

17 **MS. ROY:** Your Honor, we have not yet sought leave in
18 the English court.

19 Prior or -- sorry. Following our initial application,
20 this was after -- it was initially filed in December after
21 about nine rounds of letters back and forth between the
22 parties. And then in the English court, you need to file a
23 proscribed process of exchanging information. It's a
24 pre-action protocol process.

25 We believed we had sufficiently done that by -- in

1 December and were ready to proceed. The claim was made by
2 SBI -- by the SoftBank defendants that insufficient information
3 had been provided, and we had not expressly filed a, quote,
4 letter before action, and served them with that. And they had
5 threatened that if we proceeded that they would move for costs
6 or sanctions of some type of that.

7 So to take that off the table, Credit Suisse officially
8 served them with a letter before action, did so in February of
9 this year. And as soon as one serves that, you need to give
10 sufficient time to provide a response. We asked for a response
11 in two months. We thought that was sufficient time. They took
12 more than that, and finally served their letter last week.

13 We are reviewing -- U.K. counsel is reviewing that letter
14 to see if any further steps need to be done with that back and
15 forth process before they can proceed to file for leave to
16 file, to file the claim. And we hope that if no further
17 correspondence is really necessary in that process, that we
18 could file within the month.

19 But, again, their last communication on this with -- from
20 the SoftBank defendants last week was that they still felt
21 there was insufficient information and it would be improper to
22 proceed. So we have the back and forth in the U.K. They're
23 saying: You still can't proceed with this lawsuit.

24 And here we are before Your Honor and they're saying: Why
25 haven't you filed yet? You shouldn't get your discovery.

1 And so we think those are inconsistent positions. We
2 believe -- this is a reasonable contemplation. The complaint
3 will be --

4 **THE COURT:** So I'm not asking for argument. I didn't
5 ask for argument. I asked for a status report, because I
6 don't -- I'm not -- as I said, I can get through the mandatory
7 factors. That's not the issue for me.

8 So what happens next? What is the test about whether or
9 not you're ready to file for leave?

10 I mean, how is -- how are you going to make that decision?
11 What's the test?

12 **MS. ROY:** So my client with U.K. counsel will evaluate
13 the claims that they've made there that there is insufficient
14 information provided. We think we have provided enough
15 information; therefore, we're ready to move forward. But it's
16 not a decision I can make. It's a decision that our U.K.
17 solicitors and barristers will be making.

18 **THE COURT:** But what's the standard under the
19 prefiling protocol for what has to be provided before you can
20 move forward?

21 **MS. ROY:** My understanding is that sufficient
22 information about the claim and the remedy that's being sought.
23 And we think we've provided that and I think they take the
24 opposite position.

25 **THE COURT:** And what -- okay. Well, that doesn't

1 actually answer my question.

2 But once you get through the prefiling stuff and you seek
3 leave, how long does it take for the Court to rule on that?

4 **MS. ROY:** We anticipated it would be disputed and it
5 would take a couple of months.

6 **THE COURT:** Couple of months. So if you filed within
7 the month, we could expect a decision within about 90 days?

8 **MS. ROY:** I think that would be on optimistic view,
9 but that would be our hope.

10 **THE COURT:** Okay. Well, so one way or the other it
11 sounds like you're going to apply in the near future, and my
12 concern is that I don't know whether it's going to be granted.

13 If it's denied, then -- and, of course, you can't file
14 your claim and all of this discovery will be for naught. It's
15 not insignificant discovery. And so my feeling about this is
16 to address this as sort of a practical question is whether or
17 not -- there doesn't seem to be any reason for having the
18 discovery until you have permission to file.

19 There is nothing in the materials that suggests that there
20 is a reason why you need it before then. There is no question
21 that it's significant discovery. And these folks might never
22 have to go look for it if the precondition is not met.

23 And so my tentative thought is to try to figure out a
24 practical way to deal with that. And that is -- and there is a
25 couple of ways to do it. One of ways I was thinking about is I

1 grant the petition conditionally, saying you can have a
2 subpoena that is not any broader than the one you've given to
3 me and takes out paragraph 4 -- which I think you're not
4 defending anymore -- but you can't serve it until you get leave
5 to file the claim and serve the non-U.K. defendants.

6 And then go through a process where we all -- where you
7 all do what is the next thing that should happen, which is meet
8 and confer on the actual details of the production, and we get
9 to keep that process going while we're talking about -- while
10 we're waiting for leave to be granted or denied. But if it's
11 denied, I wouldn't want to be in the position of having
12 already -- especially if since it's -- you know, we're not
13 talking about five years before the PTO. We're talking about a
14 pretty prompt process it sounds like. And so I didn't see any
15 reason why we had to -- why this couple of months mattered.
16 But that's my thought.

17 Maybe, Ms. Roy, you have a thought on that.

18 **MS. ROY:** Yes, Your Honor. I think, the -- first we
19 would say that the law does not require the petitioner to wait
20 as long as the proceeding is in reasonable contemplation, and
21 it is here. We've provided an objective basis to say that it
22 is in reasonable contemplation --

23 **THE COURT:** So I'm not disputing that. And I thought
24 I told you that it's -- this is the discretionary factor of
25 whether this is an undue burden. And that's -- so that's --

1 the question is whether or not. And I think I'm perfectly
2 cable of doing it.

3 There are some courts, including the Second Circuit, that
4 have done it under the mandatory factors. But just leaving
5 that aside, under the discretionary factors, as a practical
6 matter, why not wait?

7 **MS. ROY:** I don't think the law requires us to wait.
8 I don't think -- I think the requests are tailored and limited
9 as far as discovery generally goes in the United States.

10 **THE COURT:** Why -- you're not persuading me with that
11 argument. And you're not going to persuade me with that
12 argument. The only way you're going to persuade me is if there
13 is a good practical reason. Because I think in terms of the
14 undue burden, I've got a lot of discretion here. And in order
15 to convince me to exercise my discretion, you have to convince
16 me that it actually makes a difference.

17 **MS. ROY:** I think the declarations we've submitted by
18 Ms. Gloster and Mr. Golding, our solicitor and barrister, have
19 indicated that we do believe those documents would be useful in
20 terms of starting the proceeding and providing these initial
21 applications.

22 I think, they both say that the documents really are for
23 the use, once the proceeding is going, but we do believe they
24 will be used in those preliminary steps as well.

25 **THE COURT:** Okay.

1 **MS. ROY:** They are not necessary, but they will be
2 used.

3 **THE COURT:** Well, I understand that. But if they're
4 not necessary -- which is what I took from it as well -- then
5 you don't really need them right now. I mean, that's the --
6 what I drew from those experts is: Yes, they're important to
7 the litigation, and if we had them now, yes, we would use them,
8 but they aren't necessary to the first stage. They are
9 necessary to subsequent stages.

10 And so I'm trying to figure out, you know -- you know, and
11 it's also, you know, you've been perfectly willing to file the
12 motion for leave without these documents. I mean, since
13 December or January. And so -- and that's -- that -- so it
14 certainly suggests that these aren't that important at least.

15 But what I took from the experts' declarations was that
16 they were -- they might be used, but they weren't necessary for
17 the first phase. And so that's why I came up with this sort of
18 practical solution.

19 You know, I could envision circumstances where, you know,
20 not having them now might actually be harmful. But I didn't
21 see that in your papers and so that's why I raised this
22 question.

23 **MS. ROY:** And, Your Honor, we don't disagree that they
24 are not necessary. But, again, the standard, we believe, is
25 for use. They don't have to be necessary. They don't have to

1 be important to. They have to be for use in the proceeding.
2 The proceeding begins as soon as they filed the leave
3 application.

4 **THE COURT:** That's actually not the test, because
5 we're talking about undue burden. And so, I'm going to
6 balance -- like I would under the Federal Rules of Civil
7 Procedure -- how much effort you're making them go to against
8 whether it's -- makes sense in the proceedings. So it's not --
9 not actually the tests.

10 But, you know, if, if I -- and I'm not talking about
11 ultimately denying you the discovery. I just haven't seen
12 any -- heard any reason why it's needed right now. In fact,
13 I'm inclined to grant generally what you're talking about.

14 I'm just trying to figure out what's the practical reason
15 for having it now, when it's, you know, two months from now,
16 three months from now, you may be denied permission to file
17 your claim, and denied leave or whatever they call it in the
18 U.K. And at that point, I don't see why there should have
19 been, you know, a hundred attorney hours going into figuring
20 out what gets produced and what's privileged and what shouldn't
21 be produced, and going through the e-discovery process,
22 et cetera, et cetera.

23 **MR. FELDMAN:** Your Honor, this is Robert Feldman.

24 May I be heard for a moment?

25 **THE COURT:** In a minute. I want to make sure Ms. Roy

1 has exhausted her -- what she wants to say.

2 **MR. FELDMAN:** Of course. Of course.

3 **MS. ROY:** I think, Your Honor, again, the couple of
4 months was my best guess in when a court will decide this.
5 And, I guess, the process is -- you know, we wanted to start
6 this process. It's obviously going to be a hard-fought
7 discovery on multiple levels in this case.

8 For eight requests, Your Honor, has noted how much expense
9 and time has gone in with just that. And we want to get the
10 process started now with these documents. This is probably not
11 the only document that we'll be seeking from a third party to
12 further this lawsuit.

13 And to wait just -- again, the guess -- if it was my guess
14 it would be a couple of months when they signed the leave
15 application. To the extent that is also fought and it took us
16 five months to get here just with respect to just eight
17 discovery requests, when we are disputing leave and
18 jurisdiction, it could very well be longer than that.

19 And so it might not be a couple of months. It could be
20 much longer than that. And we would like to start the process
21 now. We would like to get the documents now and begin that
22 process.

23 **THE COURT:** Okay. Mr. Feldman?

24 **MR. FELDMAN:** Your Honor, I have two comments and, if
25 I'm permitted, one question. May I make the first two

1 comments?

2 **THE COURT:** Definitely can make the comments.

3 **MR. FELDMAN:** Okay. The first comment is that you'll
4 be delighted to know that you're quite correct.

5 The second Golding declaration makes clear that these
6 documents are not necessary now. That is at Docket 20-1,
7 paragraph 19. That's my first comment.

8 My second comment, and this is in response -- indirectly
9 to Your Honor's questions, it is not argument about the law or
10 the facts.

11 Having -- I was in trial when the opening brief was filed.
12 I read it and authorized its filing. I participated heavily in
13 the drafting of the reply brief. And I noted in the opposition
14 a suggestion that there might be some daylight between the
15 respondent's willingness to produce documents and what would
16 happen in an English proceeding with respect to SBIA (US)'s
17 documents.

18 And in response to Your Honor's questions about what's
19 necessary and what's appropriate and what's undue burden, I am
20 authorized by SBIA to make the following unequivocal statement,
21 and Mr. O'Connor is on the phone to hear this. And I'm going
22 to say this even more slowly than I usually speak so that it's
23 perfectly transcribed and everybody has got it. And this goes
24 to whether there is any necessity for any discovery process in
25 this country.

1 If a U.K. case is permitted to go forward, and if
2 SBIA (US) is not a party, SBIA (US) will transfer all of its
3 documents relating to this matter to the SoftBank entities that
4 are named as parties. To be clear, this is a commitment to
5 Your Honor, to this court, and is not a submission to the
6 jurisdiction of the English courts by any SoftBank entity.

7 **THE COURT:** So I just -- just to make sure I
8 understood what you just said --

9 **MR. FELDMAN:** Yes, Your Honor.

10 **THE COURT:** SBIA (US) is stipulating on the record
11 here that if the -- there is -- the U.K. case is permitted to
12 go forward and SBIA (US) is not a party, you will, SBIA (US),
13 will transfer all of its documents involving all of the matters
14 at issue --

15 **MR. FELDMAN:** Yes.

16 **THE COURT:** -- to the SoftBank entities that are named
17 in that proceeding.

18 Is that right?

19 **MR. FELDMAN:** Yes. Correct. And without any
20 review -- it will be a simple thing for SBIA (US) to do. They
21 will just send everything.

22 **THE COURT:** Right.

23 **MR. FELDMAN:** And just leave it to defendants in any
24 authorized lawsuit in the U.K. about this matter to sort out
25 the discovery.

1 That, in my opinion, is the same thing that we have in
2 effect, I thought, proven by the expert testimony that said
3 where there is a contractual relationship and a custom and
4 practice, the U.K. courts would find that the documents are in
5 the vision fund's custody and control.

6 But if Your Honor was concerned about that as somehow
7 qualified or conditioned or cabined or caveated, I didn't want
8 Your Honor to have that concern.

9 So as -- as authorized by my client, who has read this,
10 and who is on the phone, we are prepared to eliminate any
11 necessity for any activity by SBIA (US), other than sending all
12 of its files. And Your Honor can -- you know that I'm not
13 going to quibble about what that means, but if you want to
14 define it somehow, you're certainly able to in an order -- all
15 electronic, all paper, blah, blah, blah, everything that we
16 have that relates to the matters that are in the papers you'll
17 get. Excuse me, the SBIA defendant -- excuse me -- the
18 SoftBank defendants in an authorized action will get.

19 **THE COURT:** So you're -- I understand that.

20 **MR. FELDMAN:** Yeah. So, there is no -- no offense to
21 you or to anyone on this call, we never have to see each other
22 again. It will just be sent.

23 **THE COURT:** Well, I appreciate that.

24 And it is -- one of the questions I had on the
25 discretionary factors other than the one I commented about.

1 But you had another comment to make?

2 **MR. FELDMAN:** I had a question. It's more in the
3 nature of you're going to call it argument, and I don't want to
4 get on the wrong side of you, so I wanted to --

5 **THE COURT:** We're here for argument.

6 **MR. FELDMAN:** I know. But I think -- I do believe
7 that what I just said eliminates every single question of every
8 single aspect of everything having to do with this litigated
9 matter. We will send everything to a defendant in a properly
10 authorized action.

11 And then the -- if there is a plaintiff in England, the
12 plaintiff can seek it from the proper defendants, and they can
13 fight about it there.

14 You don't have to order meet and confers. I don't have to
15 participate in them. There doesn't have to be anymore
16 discussion. You just say: Do it.

17 **THE COURT:** Ms. Roy, thoughts?

18 **MS. ROY:** So this is the first that we're hearing of
19 that, and so we'd need to think about that. Never raised in
20 the meet and confers -- or the single meet and confer on this.

21 But, I guess my one concern would be Mr. Feldman's
22 statement that we would have that fight "over there," meaning
23 it would be left up to the U.K. court. And I do think that is
24 imposing a foreign discoverability test. It's not -- I don't
25 think it's a disputed question that the U.S. courts permit

1 broader discovery than the U.K. courts sometimes do. And that
2 that is not a requirement under the statute, that it has to be
3 something that a U.K. court would grant, that we could have it.
4 But that would be my concern about it. But, again, this is the
5 first time that we're hearing that.

6 **MR. FELDMAN:** I don't -- I'm not going to respond to
7 that, unless you want me to.

8 **THE COURT:** I do.

9 **MR. FELDMAN:** You want me to respond to that?

10 **THE COURT:** Yes.

11 **MR. FELDMAN:** Okay. I don't know what the U.K. courts
12 do or don't want, do or don't allow, but it certainly shouldn't
13 be -- we certainly shouldn't engage in a process here for the
14 purpose of providing more discovery than the U.K. courts would
15 permit.

16 **THE COURT:** Why is that?

17 **MR. FELDMAN:** Because one of -- one of the very
18 discretionary factors says that, that you're not supposed to.

19 **THE COURT:** Well, 1782 does not, as Ms. Roy says, have
20 a foreign discoverability requirement. In fact --

21 **MR. FELDMAN:** And I agree with that.

22 **THE COURT:** -- it could be that the foreign
23 discoverability rules could be much less favorable than in the
24 U.S. --

25 **MR. FELDMAN:** I agree.

1 **THE COURT:** -- but as long as they are open to getting
2 whatever we produce, then it doesn't matter. The -- some --
3 you know, there is -- the case law on this is sort of all over
4 the map.

5 **MR. FELDMAN:** It certainly is.

6 **THE COURT:** As someone said, you know, you can't
7 sidestep on favorable foreign rules and someone saying it's not
8 really not our problem because we're going to apply what we're
9 supposed to apply. But, you know -- and I tend to think that
10 1782 was not designed to cabin discovery within the bounds of
11 what the U.K. might permit.

12 **MR. FELDMAN:** I --

13 **THE COURT:** Because that could litigate -- result in
14 ridiculous sorts of litigation.

15 **MR. FELDMAN:** I completely agree. But here I'm
16 offering the Court, in the exercise of its discretion, a
17 perfect opportunity, frictionless opportunity, costless
18 opportunity to put the documents into the foreign jurisdiction,
19 which is what the purpose here is, and let the foreign
20 jurisdiction sort it out. That is exactly what 1782 is
21 designed to do.

22 So this is -- this is a -- I don't want to say it's an
23 unusual case, but it's a perfect case of making 1782 serve all
24 of the purposes that it's supposed to serve with no trouble.
25 It's perfect, that is to say it's frictionless. It's -- it

1 will be a perfect representation of what the English courts
2 want.

3 And it's not -- I'm not suggesting to you that it's
4 because they want less or because they want more. No offense
5 to Your Honor, you should not care. You just want to put the
6 documents in England and let the English court sort it out.

7 The typical cases, and the ones that Ms. Roy is talking
8 about and perhaps Your Honor is puzzling about are cases where
9 somebody says: I'm not going to send those documents because
10 the Cayman Islands or Malta or Nigeria wouldn't want them or
11 wouldn't use them.

12 That's not what I'm saying. I'm saying we are without
13 question and qualification and cabin and caveat sending it all,
14 and then our friends in the U.K. can deal with it.

15 That's a perfect representation of what 1782 should do.
16 And I'm telling you that the language that I read -- which I'm
17 happy to read again or send to Your Honor -- is exactly what we
18 will do. Just send it. Assuming that there is a lawsuit and
19 there is a SoftBank defendant.

20 And I do have a question which I would ask when we're
21 on --

22 **THE COURT:** Let me get Ms. Roy's response to what you
23 just said.

24 **MR. FELDMAN:** Sure, Your Honor.

25 **MS. ROY:** Your Honor, I can only expect that they are

1 making this offer because it will be less discovery than if
2 they gave it to us under the subpoena or the jurisdiction of
3 this Court and what we're permitted under 1782. And, again,
4 letting the foreign court sort it out is imposing a foreign
5 court discoverability test.

6 **THE COURT:** You had a question, Mr. Feldman?

7 **MR. FELDMAN:** Yes, Your Honor.

8 This question relates to a different topic, if I may.

9 **THE COURT:** Sure.

10 **MR. FELDMAN:** Okay. It relates to the mandatory
11 factors, that is the statutory factors. And my question to
12 Your Honor is whether Your Honor has considered the IJ case --
13 *IJK* case from the Second Circuit which we submitted recently.

14 **THE COURT:** I have. Absolutely, I have.

15 The difference between that case and this case, as I
16 recall, is in this case we actually have experts proving up
17 that they can get through the step of permission. That's the
18 difference.

19 **MR. FELDMAN:** I believe that that's a distinction
20 without a difference, and I'll address that briefly if you
21 would like.

22 **THE COURT:** Sure. Go ahead.

23 **MR. FELDMAN:** Okay. What the IJ -- *IJK* case stands
24 for, I believe, is that when there are significant procedural
25 hurdles that have to be met, it cannot be said documents are --

1 or that the lawsuit is reasonably contemplated.

2 The language in the *IJK* case is important. It says -- and
3 I know you've read it, but (reading):

4 "When there are significant procedural barriers
5 under foreign law that might prevent the party from
6 suing or using the material, it seeks" -- then the
7 mandatory factor is not satisfied.

8 And I agree with you, in this case, there are experts. In
9 the *IJK* case it was not clear, frankly, whether there were
10 experts or not. Looking at the list of counsel in that case,
11 my guess is that there would have been and -- but I don't think
12 that's the real test.

13 I think what the *IJK* case says is when there is a good
14 faith, reasonable dispute about whether there will be a foreign
15 lawsuit, it is not appropriate for our courts to produce --
16 order production. That's what I believe it says.

17 **THE COURT:** I thought it said that you had to have an
18 objective basis to conclude that they could get over those
19 hurdles.

20 **MR. FELDMAN:** That's a correct statement.

21 **THE COURT:** And why isn't that an expert who says
22 we're getting over it?

23 **MR. FELDMAN:** Because in this case, we have an expert
24 who says that they won't. And in the *IJK* --

25 **THE COURT:** Do you think they have to actually

1 prove --

2 **MR. FELDMAN:** I think that Your Honor is required --
3 and this is what the *IJK* case said, and what an earlier opinion
4 by then Professor -- actually not then professor, one time
5 Professor Lynch, then circuit court judge said, is that
6 Your Honor is not -- and this is probably what you're
7 reflecting.

8 No one would expect Your Honor to assess the merits of
9 proposed foreign action. But this *IJK* case says that you are
10 supposed to take a limited foray into foreign law to assess the
11 procedural mechanism by which a movant may inject the discovery
12 into foreign proceedings. And this case says that that burden
13 is on the party seeking the documents.

14 And I believe that in our record -- I'm not here to tell
15 you that our guy is smarter than their person, and I'm not here
16 to tell you that we proved it and they failed to prove it and
17 there is no way, et cetera, et cetera.

18 What I'm saying -- and this is how I would look at it.
19 They've taken five months having told you that it would be a
20 few weeks.

21 We have submitted an expert declaration saying, "no way."
22 They've submitted a declaration expert declaration saying, "yes
23 way."

24 And I think under those circumstances under the *IJK* case
25 with respect to the procedural mechanisms, they have not

1 carried what the *IJK* case said was their burden.

2 So while I understand if Your Honor is approaching this
3 from the perspective of us, for example, saying that we're
4 going to prove that they're wrong, so this is a stupid case and
5 you shouldn't send the documents; that's not what we're saying.

6 We're saying something not all that different. You'll
7 pardon me for saying it this way, than what you're saying,
8 which is: We don't know what's going to happen, so why should
9 we do this? Let's wait.

10 And I will tell you that that's exactly what I would
11 suggest, is that we wait. Your Honor has proposed one way of
12 waiting, namely that we -- you grant the motion but say they
13 can't serve the subpoena or we don't have to respond until
14 there is a ruling from the British courts. That's fine.

15 You could also deny -- or grant our motion without
16 prejudice to renewing it.

17 There is a whole number of ways that you could do it. But
18 I would urge you -- and I know you have and I would ask that
19 you perhaps give additional consideration to the *IJK* case,
20 because I think, first of all, it's close to being on all
21 fours.

22 There was a liquidator. The liquidator couldn't or
23 wouldn't go forward; that's exactly what we have here. There
24 were procedural steps that the moving party needed to go
25 through to get a case on file, and the Court held they hadn't

1 shown that they were going to do that. That's what we say has
2 happened here.

3 And I agree that you have here a battle of experts. And I
4 would not ask Your Honor to resolve that as you might have to
5 on a summary judgment motion. Here, what I would say is that
6 Your Honor can easily say: These are two fabulous experts. I
7 don't know how this will work out. Neither has convinced me to
8 a certainty. Neither has even convinced me --

9 THE COURT: I got to tell you -- let me stop you.

10 MR. FELDMAN: Yes. Sure.

11 THE COURT: There is nothing in that opinion that
12 you -- that says anyone has to convince me to a certainty.

13 MR. FELDMAN: I said that. I agree.

14 THE COURT: There is nothing -- not in the opinion --

15 MR. FELDMAN: I agree.

16 THE COURT: -- in the Second Circuit opinion --

17 MR. FELDMAN: I agree.

18 THE COURT: -- that's not the test.

19 MR. FELDMAN: I totally agree.

20 THE COURT: Where you lose me -- where you lose me in
21 terms of the mandatory factor --

22 MR. FELDMAN: Yes.

23 THE COURT: -- is that I don't think the limited foray
24 that the Second Circuit invited is anything more than what they
25 came up with, you know, in the *Squire Patton Boggs* case which

1 was, you know, a reliable -- sufficiently reliable indications
2 of the likelihood the proceeding will be instituted within a
3 reasonable period of time. And they used language of a
4 sufficient basis to conclude. They don't talk about: I got to
5 make a finding.

6 **MR. FELDMAN:** I agree with you. I think the only
7 finding --

8 **THE COURT:** Well, but then the answer is --

9 **MR. FELDMAN:** I think --

10 **THE COURT:** Then the answer is, if they have an
11 objective basis for concluding it and certainly one looking at
12 their expert could say: That's a sufficient basis to conclude,
13 it might be wrong but it's a sufficient basis.

14 I don't think that's -- the limited foray that the
15 Second Circuit invited is the kind of thing where you're
16 saying: Well, if there is a battle of the experts, then the
17 defendant wins.

18 **MR. FELDMAN:** Well, I will read to you that the
19 Second Circuit said, with respect to the party seeking the
20 discovery (reading):

21 "It has not carried its burden to show that the
22 proposed suit is within reasonable contemplation and
23 it is not entitled to discovery under Section 1782."

24 And in the very next paragraph, in connection with that,
25 it said (reading):

1 "A district court's focus is not on the merits,
2 but on the movant's practical ability to inject the
3 requested information into a foreign proceeding."

4 And given the record here, where they said they would do
5 it within five weeks -- a few weeks and it's now five and a
6 half months, and they still don't seem to be able to pull
7 themselves together to make this application --

8 **THE COURT:** And your client had nothing to do with
9 that. Don't give me --

10 **MR. FELDMAN:** Well, perhaps we did.

11 **THE COURT:** Oh, no. Come on. Listen, nobody is
12 fooling me. I understand. I understand this is all part of
13 the dispute game.

14 **MR. FELDMAN:** Yes.

15 **THE COURT:** It's just part of the dispute game.

16 **MR. FELDMAN:** Yes.

17 **THE COURT:** You guys resisting, them having gone
18 through the prerequisites to even ask a court is just a part of
19 the dispute game as you bringing a motion to quash here --

20 **MR. FELDMAN:** Yes.

21 **THE COURT:** -- and offering to have the documents
22 there so that somebody in the U.K. will fight them on the
23 documents there. So I'm not -- I'm not actually going to buy
24 into the details of the game the way you characterize it in
25 terms of attributing: Well, they should have done it. They

1 have taken five months. They may never be able to get it.

2 I'm not buying that.

3 **MR. FELDMAN:** Okay. Well, I would then reframe my
4 comments and questions to the following extent.

5 I agree with you, we should wait. I would ask the Court
6 to review the *IJK* case. I have nothing else to say.

7 **THE COURT:** Okay. So the only question in my mind is
8 would your client be willing to transfer the documents now?

9 **MR. FELDMAN:** I haven't asked, but I would assume.

10 **THE COURT:** Would that change the landscape, Ms. Roy?

11 **MS. ROY:** I don't believe so, when they're
12 transferring them to avoid U.S. discovery.

13 **THE COURT:** Hm-hmm.

14 **MR. FELDMAN:** Your Honor, I will tell you that if we
15 aren't so willing, I'll notify the Court promptly, but I assume
16 we are.

17 **THE COURT:** Yeah. Well, I'll take you up on your
18 stipulation to transfer them. I'll certainly include that in
19 the opinion, as it's stated on the record already.

20 **MR. FELDMAN:** Thank you.

21 **THE COURT:** But -- so I don't -- but I'm -- this is
22 all, as I said, part of the dispute resolution process. And
23 I'm going to get things started.

24 I think the way I have envisioned this is actually
25 reasonably practical, and it will cause you all to do things

1 which are less than responding to the subpoena, but more than
2 doing nothing and waiting until something happens in the U.K.

3 It's probably too Solomonesque, but -- so the idea is I'm
4 still focusing on granting the application conditionally that
5 you can, upon granting of leave to file and service of at least
6 one defendant with the 432 claim -- or granting leave to file
7 and granting leave to serve, I should say, at least one
8 defendant with the 432 claim, you can serve a subpoena which is
9 not broader than the one that you applied for on SBIA (US),
10 with the exception -- and you should eliminate paragraph 4
11 because I think you eliminated that during the briefing.

12 Number one.

13 Number two, I want you to start talking about the elements
14 of this subpoena now. This is the doing more than just waiting
15 for the U.K. I want the meet and confer process on the actual
16 details of what might get produced to start right away because
17 I'm -- we're going to -- we're going to see how this plays out.

18 We're going to see how long the fight takes in the U.K.
19 We're going to see what happens and whether or not I should
20 advance the time for producing it, or the time that producing
21 it makes sense. But in any event, I want to be ready for all
22 of those possibilities, and I think one of those is having you
23 all start to figure out exactly what would be produced assuming
24 it was served.

25 So I want the parties to immediately start their meet and

1 confer efforts. And you can write as many letters as you want,
2 but you must have at least one face-to-face, at least by video,
3 doing that.

4 And then I would set a status conference -- I don't
5 know -- 90 days out. Some reasonable period of time out to
6 talk about what's the status of the decision and the
7 application in the U.K.

8 Did I say 432 instead of 423? 423.

9 And to talk about the scope and hopefully resolve the
10 scope. Hope springs eternal. I know you won't resolve the
11 scope. The way this fight is shaping up, there is going to be
12 some fuss about it. But maybe, maybe, hope springs eternal.
13 That will be great. I promise to be extremely unpleasant if
14 you don't resolve the scope; but maybe that's not enough
15 incentive to get people to resolve scope issues. But that's my
16 plan.

17 Anyone want to make any last comments about why I'm making
18 a mistake or how I should modify it or anything? Starting with
19 Credit Suisse.

20 **MS. ROY:** We have nothing further to add to what we've
21 already argued. Thank you, Your Honor.

22 **THE COURT:** Mr. Feldman?

23 **MR. FELDMAN:** I have a whole lot to say. That's a
24 joke.

25 **THE COURT:** Excellent.

1 **MR. FELDMAN:** I think 90 days is ambitious. I don't
2 think -- based on what I have heard, but I don't know for sure,
3 I don't think there is any way that U.K. proceedings get
4 resolved that way.

5 And I would have a question for you. If I were to be able
6 to inform you that we were able to send all our documents
7 forthwith to the U.K., would that eliminate the need for me to
8 have anything to do with this discovery?

9 **THE COURT:** No, it wouldn't.

10 **MR. FELDMAN:** Okay. Then I'm not going to ask them
11 for that.

12 **THE COURT:** I thought you might not, but --

13 **MR. FELDMAN:** I think 90 days is ambitious.

14 **THE COURT:** It may be ambitious, but I want to keep
15 tabs on this. And I do want to press ahead with the meet and
16 confer and make sure that happens and it's all resolved within
17 90 days. That may be ambitious itself, but that's why I want
18 to proceed in this fashion.

19 Okay. Well, so that's what I'm going to do. And I'll --
20 let's set a date, Karen, 90 days out.

21 **THE CLERK:** How does August 19th work on everybody's
22 calendar? At 2:00 p.m.?

23 **THE COURT:** Sure.

24 **MR. FELDMAN:** Your Honor, I'm not sure if I'm not
25 free, and I'm not at my desk. If that date doesn't work, may

1 we apply to you for a minor adjustment?

2 **THE COURT:** You talk to the other side if you want to
3 stipulate to a change in the date.

4 Does that work for Credit Suisse?

5 **MS. ROY:** It does.

6 **THE COURT:** Okay. All right. Give me a week in
7 advance a joint status conference statement that addresses
8 where we are on everything, and then we'll have that
9 discussion. Okay.

10 **MR. FELDMAN:** Have a nice weekend, Your Honor.

11 **THE COURT:** Thank you all.

12 **MS. ROY:** Thank you, Your Honor.

13 **MR. CORKHILL:** Thank you, Your Honor.

14 **MR. BIDERMAN:** Thank you, Your Honor.

15 (Proceedings adjourned at 3:02 p.m.)

16 ---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Tuesday, May 24, 2022

A handwritten signature in blue ink, reading "Ruth Levine Ekhaus", followed by a horizontal line.

Ruth Levine Ekhaus, RMR, RDR, FCRR, CSR No. 12219
Official Reporter, U.S. District Court